IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FRANCISCO LIMON,	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	Case No. 02-4019-DWB
	)	
CITY OF LIBERAL, KANSAS,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

The court now considers a motion for summary judgment filed by defendant, City of Liberal, Kansas (Liberal). (Doc. 37.) Liberal seeks summary judgment on all claims brought by plaintiff, Francisco Limon (Limon). Limon failed to file a response. Liberal's motion is GRANTED, for the reasons set forth herein.

BACKGROUND

Limon worked for Liberal's water department for over twenty years. (Doc. 32 at 3.) He apparently served as superintendent of that department for several years, *id.* at 5, until Liberal terminated his employment in October, 1999. *Id.* at 3.

In this role, one of Limon's primary responsibilities was to ensure that water meters connected to Liberal's public water system were properly read. *See* Doc. 38 at 1. These readings were used to bill customers, including private citizens and commercial entities, for their monthly water consumption. *See id.* at 10; *id.* exh. Webb Deposition at 42. Relevant to this case, Limon is both Hispanic and a member of the Jehovah's Witnesses religion. (Doc. 32 at 2.) In his complaint, he alleges that both his race and his religion were factors that motivated Liberal to fire him, thereby violating laws set forth in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17. (Doc. 1.)

Conversely, Liberal maintains that Limon was terminated due to dereliction of his duties. *See* Doc. 38 at 1. Liberal alleges that Limon failed to properly supervise his department, thereby permitting his subordinates to guess at water meter readings without ever visiting the meter site and actually observing the meter dials. *See id.* at 1, 14-15. Furthermore, Liberal claims that, because of this failure, the city lost hundreds of thousands of dollars in revenue, *id.* at 4, suffered downgrades to its bond rating, *id.* at 19, incurred higher interest rates on its public debt, *id.*, and lost the confidence of its citizens due to the enormous billing errors that subsequently accumulated. *Id.* exh. Webb Deposition at 96-100.

Following his termination, Limon filed a complaint with the Kansas Human

Rights Commission (KHRC) and the Equal Employment Opportunity Commission (EEOC), alleging employment discrimination based on race and religion. (Doc. 1 ¶ 5.) Several months later, Limon filed another complaint with the KHRC and the EEOC, alleging that Liberal retaliated against him for engaging in protected opposition to discrimination. *Id.*; *see also* Doc. 33 app. Amended Complaint. Limon claims the retaliation took the form of unfavorable references to prospective employers. (Doc. 33.) The EEOC issued a Notice of Right to Sue on both complaints (Doc. 32 at 3), after which Limon timely filed the present suit. *Id.* In sum, this case involves two claims: 1) a claim for unlawful employment discrimination under 42 U.S.C. § 2000e-2; and 2) a claim for retaliation under 42 U.S.C. § 2000e-3. Liberal filed the instant motion seeking summary judgment on both claims. (Doc. 37.)[1]

[1]Liberal's Motion for Summary Judgment was filed on December 18, 2002. (Doc. 37.) On December 26, 2002, Limon's former counsel, Mr. Bill Fry, filed a motion to withdraw. (Doc. 39.) The court extended the date for Limon to respond to the summary judgment motion by 30 days, to February 6, 2003. (Doc. 41.) At a telephone status conference on February 10, 2003, the court allowed Fry to withdraw, and granted a second extension of time of 60 days, until April 11, 2003, for Limon to respond to the motion for summary judgment. (Doc. 45.) No response was filed, nor did Limon seek any further extensions of time to file a response.

SUMMARY JUDGMENT STANDARD

Under the local rules applicable in the District of Kansas, when a party fails to respond to a motion, the motion is normally considered as an uncontested motion and granted. D.Kan. Rule 7.4. By its own terms, that rule applies to all motions, including motions for summary judgment. *Id.* However, local rules must be construed and applied in conformity with superior rules, including the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 83(a)(1); ***Reed v. Bennett***, 312 F.3d 1190, 1194 (10th Cir. 2002). Accordingly, D.Kan. Rule 7.4 must be interpreted in a manner that is consistent with Fed. R. Civ. P. 56, which governs summary judgment.

Fed. R. Civ. P. 56(c) directs the entry of summary judgment in favor of a party who "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Thus, the moving party must make the required showing regardless of whether the non-moving party responds to the motion. *See* ***Reed***, 312 F.3d at 1194. Only then does the non-moving party's failure to respond become relevant, because it is only after the movant satisfies his initial burden that the adverse party must respond in a manner so as to demonstrate that a genuine issue of material fact *does* exist. Fed. R. Civ. P. 56(e); ***Reed***, 312 F.3d at 1194 (citing ***Adickes v. S.H. Kress & Co.***, 398 U.S.

144, 160-61, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)). "If the party does not so respond, summary judgment, *if appropriate*, shall be entered against the adverse party." ***Reed***, 312 F.3d at 1194 (quoting Fed. R. Civ. P. 56(e)) (emphasis in original). Since Fed. R. Civ. P. 56 specifies when the non-moving party must respond to a motion for summary judgment, as well as the criteria for granting the motion when the non-movant fails to respond, Fed. R. Civ. P. 56 completely displaces the provisions of D.Kan. Rule 7.4 with respect to granting motions for summary judgment when no response has been filed.[2]

In order to obtain summary judgment, the moving party must first show that no genuine issue of material fact exists. Fed. R. Civ. P. 56(c). An issue is "genuine" if sufficient evidence exists on each side "so that a rational trier of fact could resolve the issue either way" and "[a]n issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." ***Adler v. Wal-Mart Stores, Inc.,*** 144 F.3d 664, 670 (10th Cir. 1998) (citations omitted). The usual and primary purpose "of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." ***Celotex Corp. v. Catrett,*** 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).

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[2]Note, however, that failing to file a timely response to a motion for summary judgment still waives the right to thereafter respond or otherwise controvert the facts alleged in the motion. D.Kan. Rule 7.4; *see also* ***Reed***, 312 F.3d at 1195.

The moving party initially must show both an absence of a genuine issue of material fact, as well as entitlement to judgment as a matter of law. ***Adler,*** 144 F.3d at 670. The nature of the showing depends upon whether the movant bears the burden of proof at trial with the particular claim or defense at issue in the motion. If, as here, the non-moving party (the plaintiff) bears the burden of proof, the movant need not support its motion with affidavits or other similar materials negating the opponent's claims or defenses. ***Celotex,*** 477 U.S. at 323. Rather, the movant can satisfy its obligation simply by pointing out the absence of evidence on an essential element of the non-movant's claim. ***Adler,*** 144 F.3d at 671 (citing ***Celotex,*** 477 U.S. at 325).

Once the moving party properly supports its motion, the burden shifts to the non-moving party, who "may not rest on its pleadings, but must set forth specific facts showing that there is a genuine issue for trial." ***Muck v. United States,*** 3 F.3d 1378, 1380 (10th Cir. 1993). Procedurally, D.Kan. Rule 56.1 permits a party to present the facts upon which it relies in either a motion or opposition in the form of an affidavit, but the rule requires that "[a]ffidavits or declarations shall be made on personal knowledge and by a person competent to testify to the facts stated which shall be admissible in evidence." The content or substance of the evidence, however, must be admissible. For example, hearsay testimony that

would be inadmissible at trial may not be included. ***Thomas v. Int'l Bus. Machs.,*** 48 F.3d 478, 485 (10th Cir. 1995). Similarly, the court will disregard conclusory statements and statements not based on personal knowledge. ***Cole v. Ruidoso Mun. Schs.***, 43 F. 3d 1373, 1382 (10th Cir. 1994) (conclusory statements); ***Gross v. Burggraf Constr. Co.,*** 53 F. 3d 1531, 1541 (10th Cir. 1995) (personal knowledge).

In the end, when confronted with a fully briefed motion for summary judgment, the court must determine "whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." ***Anderson v. Liberty Lobby, Inc.,*** 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L.Ed. 2d 202 (1986). Accordingly, the court must review the "factual record and reasonable inferences therefrom in the light most favorable to the non-moving/opposing party." ***Kidd v. Taos Ski Valley, Inc.,*** 88 F. 3d 848, 851 (10th Cir. 1996); ***Anderson,*** 477 U.S. at 255, 106 S. Ct. at 2513. If sufficient evidence exists on which a trier of fact could reasonably find for the non-moving party, summary judgment is inappropriate. ***Prenalta Corp. v. Colorado Interstate Gas Co.,*** 944 F. 2d 677, 684 (10th Cir. 1991).

EMPLOYMENT DISCRIMINATION CLAIM

Limon claims that Liberal unlawfully terminated his employment based on his race or his religion (Doc. 1 at 2-4), thereby violating 42 U.S.C. § 2000e-2. That statute states "[i]t shall be an unlawful employment practice for an employer to . . . discharge any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). "A plaintiff alleging violations of Title VII must present either direct or indirect evidence sufficient to show intentional discrimination." ***Munoz v. St. Mary-Corwin Hosp.***, 221 F.3d 1160, 1166 (10th Cir. 2000) (citation omitted). A review of the record shows that Limon has failed to present any direct evidence of intentional discrimination.

"A plaintiff who lacks direct evidence of racial discrimination may rely on indirect evidence of discrimination by invoking the analysis first articulated in *McDonnell Douglas*." ***Perry v. Woodward***, 199 F.3d 1126, 1135 (10th Cir. 1999) (citing ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L. Ed. 2d 668 (1973)). In order to establish a prima facie case of employment discrimination under 42 U.S.C. § 2000e-2(a), Limon must show that 1) he belongs to a protected class; 2) he was qualified for his job; 3) he was discharged, despite his qualifications; and 4) the job was not eliminated after his discharge. ***Munoz***, 221 F.3d at 1165-66 (quoting the test that ***Perry*** articulated for

a wrongful termination claim under 42 U.S.C. § 1981, and adopting that test for similar claims under Title VII). Once the plaintiff establishes his prima facie case, the burden shifts to the defendant to "articulate a legitimate, nondiscriminatory reason" for the termination. *Id.* (quoting ***Perry***, 199 F.3d at 1135). If the defendant does demonstrate a valid basis for the termination, plaintiff can avoid summary judgment only by showing that a genuine issue of material fact exists as to whether defendant's alleged reason was pretextual. *Id.* (quoting ***Perry***, 199 F.3d at 1135).

Prima Facie Case

The parties stipulate to the fact that Limon is both Hispanic and a member of the Jehovah's Witnesses religion. (Doc. 32 at 2.) Thus, Limon is a member of a protected class. Furthermore, the parties do not dispute that Limon was discharged and that his position was subsequently filled by a Caucasian male who is not of the Jehovah's Witnesses religion. *Id.* at 3. Thus, the only disputed element in plaintiff's prima facie case is whether he was qualified for his job.

Liberal questions whether Limon was qualified for the job of Water Superintendent. *Id.* at 8. The court notes, however, that Limon worked for the city for over 20 years. *Id.* at 3. Although the pre-trial order does not specify

whether Limon spent his entire tenure in the water department, there is some suggestion that a great deal of his employment was spent there, including several years as Water Superintendent. *Id.* at 5. Defendant has not disputed this contention. Rather than debate Limon's qualifications, the court assumes for purposes of this decision that his lengthy experience with the city, including several years serving in the position from which he was fired, qualified Limon for the job of Water Superintendent. Accordingly, Limon has established a prima facie case of discrimination under 42 U.S.C. § 2000e-2.

Legitimate Basis for Discharge

Since Limon has established a prima facie case of employment discrimination, Liberal now bears the burden of showing a valid reason for firing him. In its motion for summary judgment, Liberal has provided evidence in the form of depositions, affidavits, and other documentation to show that Limon was terminated for failing to properly supervise his department. *See generally* Doc. 38. Liberal has shown that Limon's subordinates intentionally entered false water meter readings into the city's billing system. *See id.* at 12-15. Rather than visit each meter site, Limon's employees guessed at the individual meter readings, probably based on past consumption. *See id.*

This fact was made apparent by reports generated from the meter reading software, called STARS reports. *See id.* at 13-16. Liberal used a system whereby the meter readers would enter each meter reading into a handheld recording device. *Id.* at 10-11. The handheld was programmed to predict a range of expected values for the new meter reading. *Id.* at 11. If the number entered by the meter reader was outside the expected range, the handheld would reject this value unless the person making the entry overrode the device and forced it to accept the reading as entered. *Id.* The handheld device kept a record of all attempted entries, even the ones that it rejected. *See id.* at 14-15. Among other things, the STARS reports included information about these failed entries. *See id.*

In 1999, Liberal noted that its revenues for the water department were down by over $250,000 from the previous summer, and down over $360,000 for the year, when compared to the previous year. *Id.* at 12. That fact, along with other discrepancies noted by the city's billing department, indicated that the problem was likely caused by erroneous meter readings. *See id.* at 11-12. Limon's supervisor, Jean Webb, directed Limon to look into the matter. *Id.* at 12-13. Shortly thereafter, Limon reported that one of his meter readers had "fessed up" to not actually reading the meters. *Id.* at 13. Limon appeared to end his investigation there, *id.*; however, Webb was not satisfied and decided to review

the STARS reports, herself. *Id.* She quickly noted that many meters had multiple failed entries, all within a few minutes. *Id.* at 15. Based on the way the value of the attempted entry changed each time, Webb concluded that the meter reader was guessing at the meter value, and then adjusting his guess repeatedly until he entered a number that the handheld would accept. *See id.* at 14-15.

Webb also determined from the STARS reports that the meter readers were entering readings faster than it was physically possible for them to cover all the meter sites. *Id.* This provided her with further indication that Limon's subordinates were not actually reading the meters, but simply guessing at numbers until the computer accepted them. *See id.* at 14-15. Overall, these facts paint a picture of a systemic problem - not a single, isolated instance of one meter reader who refused to perform, but of an entire department that was poorly supervised.

Liberal presented evidence that these and other problems with Limon's department significantly contributed to a shortfall of over $360,000 in the city's water revenue.[3] *See id.* at 12. When personnel were deployed to correct the problem by actually reading the meters, Liberal was confronted with numerous

[3]While the court focuses on the most glaring problems within Limon's department, Liberal's Motion for Summary Judgment also contains evidence of other failures by Limon that would support a non-discriminatory basis for termination, including failure to manage his department's overtime (Doc. 38 at 8-9), as well as evidence that Limon himself was engaged in unlawful discrimination on the basis of religion. *See id.* at 4-5.

irate citizens who were now being hit with exorbitant water bills. *Id.* at 19. The bills were extremely high because Limon's department had underestimated the actual water consumption when the readers were guessing at the meter values. *Id.* exh. Webb Deposition at 96-97. Since the meters continued to record actual water usage, regardless of whether they were properly read, the disparity between actual usage and the usage guessed by Limon's personnel grew over the summer months. *See id.* When an accurate measurement was finally obtained, several months of under-billing had to be made up in a single month's bill. *See id.* Many customers were unable to afford such a payment. *See id.* Others had recently moved to their new homes, and felt that a majority of the bill was due to prior owners. *See id.* exh. Webb Deposition at 99. As a result, Liberal was forced to write off a substantial portion of the billing errors. *See id.* Due to this unanticipated revenue shortfall, Liberal's bond rating was downgraded, resulting in higher interest costs on its debt. *Id.* at 19.

After discovering the problems in Limon's department, Webb concluded that Limon was derelict in his duties (Doc. 38 exh. 4.) and placed him on six months probation. *Id.* exh. 5. Limon was given a letter addressing his shortfalls and giving him explicit, detailed instructions on what he had to do in order to keep his job. *Id.* He was told that his primary responsibility was to get accurate

readings for all the water meters. *Id.* exh. 7. Even though Limon knew that his job was on the line over these meter readings, he failed to demonstrate that he was taking it seriously. On the contrary, he took away a truck that was key to transporting the meter readers to the meter sites. *Id.* at 18. Additionally, the handheld units were not being fully deployed to catch up on readings, but were sometimes left in the office, unused. *Id.* Therefore, Liberal concluded that Limon had violated the terms of his probation, and terminated his employment. *Id.* at 19.

Overall, Limon's failure to supervise his department caused substantial harm to Liberal. Therefore, the court finds that Liberal had a legitimate, non-discriminatory motive for placing Limon on probation and for ultimately terminating his employment. As a result, the burden shifts to Limon to demonstrate that Liberal's reasons for placing him on probation and terminating him were pretextual.

Pretext and Limon's Failure to Respond to the Motion for Summary Judgment

At this point, the significance of Limon's failure to respond to Liberal's Motion for Summary Judgment becomes apparent. Under D.Kan. Rule 56.1, "[a]ll material facts set forth in the statement of the movant [Liberal] shall be deemed admitted for the purpose of summary judgment unless specifically controverted by

the statement of the opposing party [Limon]." Therefore, all the factual issues regarding the validity of Liberal's reasons for terminating Limon, discussed *supra*, are established for purposes of this decision.

Limon has provided no evidence to show pretext. Moreover, Limon has waived his right to file a response. D.Kan. Rule 7.4. Accordingly, he can make no additional filings to show pretext. Thus, Limon has failed to meet his burden of showing that Liberal's reasons for placing him on probation and terminating his employment were pretextual.

Liberal has demonstrated that "there is no genuine issue as to any material fact" on the employment discrimination claim, and that Liberal "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is not granted simply because Limon has failed to respond to the motion, but because summary judgment is "appropriate" under Fed. R. Civ. P. 56(e).

RETALIATION CLAIM

Limon also claims that Liberal unlawfully retaliated against him for engaging in protected opposition to discrimination, thereby violating 42 U.S.C. § 2000e-3(a). That section says

> [i]t shall be an unlawful employment practice for an

> employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge . . . or participated in any manner in an investigation, proceeding, or hearing under this chapter.

42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation, plaintiff must show (1) he engaged in protected opposition to discrimination; (2) he was subject to adverse employment action; and (3) that there exists a causal connection between the protected activity and the adverse action. ***Roberts v. Roadway Exp., Inc***., 149 F.3d 1098, 1103 (10th Cir. 1998).

Although Limon makes some vague reference to protected activity during his tenure with the water department (Doc. 32 at 5), the only protected activity on which he has provided any evidence are his complaints to the KHRC and the EEOC. Those complaints constitute the only protected activity in which Limon will be deemed to have engaged.

Since those complaints were filed after he was terminated, none of the actions taken by Liberal prior to and including his termination can constitute adverse employment action in retaliation therefor. The only post-complaint activities identified by Limon are allegedly unfavorable employment recommendations made by Liberal to Limon's potential employers. (Doc. 1 ¶ 14.)

Liberal argues that post-employment activity, such as bad references to potential employers, cannot constitute adverse employment action because the employment has already ended. *See* Doc. 38 at 35. On the contrary, the Tenth Circuit liberally defines the phrase "adverse employment action," ***Sanchez v. Denver Pub. Sch.,*** 164 F.3d 527, 532 (10th Cir. 1998), and has specifically recognized that unfavorable employment references given after termination can constitute adverse employment actions. ***Rutherford v. Am. Bank of Commerce,*** 565 F.2d 1162, 1164-65 (10th Cir.1977). Accordingly, the fact that Limon was no longer working for Liberal when the allegedly unfavorable reference was given has no bearing on the inquiry.

On the other hand, Liberal has presented evidence that the person soliciting the reference was not a genuine prospective employer, but was actually a private investigator retained by Limon.[4] (Doc. 38 at 21-22.) Moreover, Liberal's description of the exchange between Limon's investigator and Liberal's employee suggests that the investigator may have intended to elicit unfavorable information

[4]By Limon's own admission, this was the only unfavorable employment reference of which he was aware. (Doc. 38 exh. Limon Deposition at 293, 296.) Limon has presented no evidence of any other potentially retaliatory action.

regarding Limon's discrimination claims in order to entrap Liberal.[5] *See id.* Regardless of whether the latter suggestion is true, the fact that the investigator had no intention of hiring Limon and his call was itself pretextual, a mere sham, shows that Liberal's actions were not an adverse employment action. An adverse employment action is one that affects the terms, privileges, duration, or conditions of employment. *See* ***Burlington Indus., Inc. v. Ellerth****,* 524 U.S. 742, 761, 118 S.Ct. 2257, 2268, 141 L.Ed.2d 633 (1998). Since the investigator had no intention of hiring Limon, Liberal's actions could not possibly affect the terms, privileges, duration, or conditions of Limon's future employment. *See id.* Therefore, Limon has failed to provide evidence of an adverse employment action that would support a prima facie case of retaliation under 42 U.S.C. § 2000e-3(a). Moreover, Limon's failure to respond to Liberal's Motion for Summary Judgment means that the facts advanced in that motion regarding the identity of the person seeking the employment reference are deemed conclusively established for purposes of this decision. D.Kan. Rule 56.1.

Liberal has demonstrated that "there is no genuine issue as to any material

[5]The court also notes that Donna Nix, the Liberal employee whose comments formed the basis of Limon's retaliation claim, attempted to refer Limon's investigator to Liberal's human resources department. (Doc. 38 at 21.) Refusing to accept that answer, the investigator persisted and sought to elicit Ms. Nix's "personal opinion." *Id.* at 22. Accordingly, her answer represented her personal view, not Liberal's official position.

fact" on the retaliation claim, and that Liberal "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is not granted simply because Limon has failed to respond to the motion, but because summary judgment is "appropriate" under Fed. R. Civ. P. 56(e).

IT IS THEREFORE ORDERED that Liberal's Motion for Summary Judgment (Doc. 37) is GRANTED.

A copy of this Memorandum and Order shall be mailed to to the *pro se* plaintiff at the address previously provided to the court for service.

Dated at Wichita, Kansas, on this 19th day of May, 2003.

s/ Donald W. Bostwick
DONALD W. BOSTWICK
United States Magistrate Judge